

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TODD L. MITCHELL)	
Claimant)	
)	
VS.)	
)	
PETSMART, INC.)	
Respondent)	Docket Nos. 1,015,618
)	1,019,828
)	
AND)	
)	
ROYAL & SUN ALLIANCE INS. CO.)	
TRAVELERS PROPERTY CASUALTY)	
Insurance Carrier)	

ORDER ON REMAND

On September 10, 2010, the Kansas Supreme Court affirmed in part, reversed in part and remanded this claim with instructions for the Board to recalculate claimant's permanent partial disability as separate injuries under the schedule set out in K.S.A. 44-510d, as more fully explained in the decision and in *Redd v. Kansas Truck Center*, 291 Kan. 176, 239 P.3d 66 (2010). The Board heard oral argument on March 18, 2011.

APPEARANCES

Michael L. Snider, of Wichita, Kansas, appeared for the claimant. Terry Torline, of Wichita, Kansas, appeared for respondent and Royal & Sun Alliance Insurance Company (Royal). William L. Townsley, of Wichita, Kansas, appeared for respondent and Travelers Property Casualty (Travelers).

RECORD AND STIPULATIONS

At the March 18, 2011 hearing, the parties stipulated that the functional impairment benefits awarded in Docket No. 1,015,618 and relating to claimant's thumb injury have been paid and there remain no issues to be determined with respect to that specific injury and the resulting permanency.

ISSUES

As noted above, this matter was remanded to the Board for a recalculation of Mitchell's award in a manner consistent with the Kansas Supreme Court's findings. In its original Order, the Board considered the medical evidence and concluded that claimant's true impairment was somewhere between the two ratings offered by each of the physicians. Thus, the Board awarded claimant benefits based upon an average of the permanent impairment ratings to each of his upper extremities at the level of the shoulder. Both claimant and respondent (through both its carriers) appealed this Order to the Court of Appeals. The Court of Appeals affirmed the Board's original order. Thereafter, both parties petitioned for review by the Supreme Court.

The Supreme Court reversed the findings of the Court of Appeals and the Board (in part) and held that it was an error for the Board to combine claimant's multiple left arm and right arm injuries into a scheduled injury to each arm at the shoulder level.¹ Accordingly, the *Mitchell* Court remanded this claim back to the Board for a new calculation based upon separately scheduled injuries. Simply put, Mr. Mitchell is entitled to an award at each separate level for his multiple injuries to the same extremity corresponding to the statutory schedule set forth in K.S.A. 44-510d. There is to be no combination of the separately scheduled injuries into a single scheduled injury.

The parties were then allowed to brief the pertinent issues and oral arguments followed.

Claimant asks the Board to reweigh the medical testimony and corresponding evidence and adopt the (higher) functional impairment opinions given by Dr. Pedro Murati, claimant's chosen physician.

Respondent and each of its carriers maintain that the law of the case has been established and affirmed. The Board should merely average the ratings provided by the two physicians at the separate levels. Respondent and its carriers do, however, ask this Board to calculate claimant's impairment to each of the separately scheduled members in such a way that gives credit for 24.14 weeks of temporary total disability (TTD) benefits that were paid to claimant.² In other words, respondent is seeking a credit of 24.14 weeks of TTD against each scheduled injury, as if 24.14 weeks of TTD benefits were paid after each separate injury. And while there is no apparent dispute over the validity of this number, there is no indication in this record that would explain when those benefits were

¹ *Mitchell v. Petsmart, Inc.*, 291 Kan. 153, 154, 239 P.3d 51 (2010). The balance of the Board's and the Court of Appeals' opinions were affirmed.

² According to respondent and Travelers, claimant was paid 24.14 weeks of TTD. The Board's original Award awarded claimant 18 weeks of TTD. The amount of TTD awarded was not made an issue on appeal to the Court of Appeals or the Supreme Court.

paid and to which injury they are attributable. It is noted that the Board's original Award allocated the TTD benefits to the right upper extremity only.³

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Upon remand to the Board, claimant asks the Board to reweigh the physicians testimony in an effort to increase the ultimate impairment ratings claimant is to receive in this matter. Although claimant may well have made such an assertion to the Court of Appeals in his appeal from the Board's original decision, no such argument was made to the Supreme Court. To the contrary, the only issues before the Supreme Court were: 1) the propriety of combining the individually scheduled injuries in each of claimant's upper extremities into shoulder impairments, 2) the propriety of deducting the TTD benefits from the number of weeks allotted on the statutory schedule set forth in K.S.A. 44-510d, and 3) the propriety of imposing joint and several liability for claimant's injuries against the two carriers involved.

At this juncture, the law of the case with respect to claimant's functional impairment has been fully litigated and established. The same is true with respect to the amount of TTD weeks that have been paid. Ordinarily, under the law of the case doctrine, once an issue is decided by the court, it should not be relitigated or reconsidered unless it is clearly erroneous or would cause manifest injustice.⁴ Here, claimant's functional impairment and the amount of TTD paid has previously been decided by the Board and has not been modified or reversed by the appellate courts. The Board merely averaged the two competing medical impairment opinions to come to a mathematical conclusion, utilizing the TTD figures contained in the record. Those findings and conclusions were not overturned on appeal and the Board will not revisit those issues.

To be clear, the error found by the Supreme Court was in the methodology of combining those ratings into a shoulder impairment and the subsequent calculation of those ratings, not in the Board's approach of averaging the two competing ratings or even in the amount of TTD awarded. Pursuant to the holding in *Redd*, carpal tunnel impairments do not combine with shoulder impairments within the same upper extremity. Thus, the Board concludes that it must do precisely as the Supreme Court directed and recompute the claimant's impairment based upon the approach announced in *Redd*, using

³ Board Order, 2007 WL 3348522 (Kan. WCAB Oct. 9, 2007) at 9.

⁴ State v. Collier, 263 Kan. 629, Syl. ¶ 3, 952 P.2d 1326 (1998).

an average of the functional impairment ratings offered by the parties' testifying physicians, taking into consideration the TTD monies paid.

The ratings offered by the physicians relative to claimant's carpal tunnel and ulnar nerve complaints are as follows:

Left Arm		Right Arm	
Carpal Tunnel		Carpal Tunnel	Ulnar Nerve
Dr. Do:	no rating ⁵	5 percent ⁶	no rating ⁷
Dr. Murati:	10 percent ⁸	10 percent ⁹	10 percent ¹⁰

Just as the Board did in its original Award, the Board finds that in this instance the rating opinions of Dr. Pat Do and Dr. Pedro Murati carry the same weight. Thus, the Board will average the opinions of both physicians. The absence of a diagnoses and rating is considered a zero. In the case of the left carpal tunnel complaints, the Board finds that claimant's separately scheduled impairment is 5 percent to the forearm. Similarly, claimant has a scheduled impairment to the right forearm of 7.5 percent. As for the right arm, the Board finds that claimant bears a 5 percent scheduled impairment for the ulnar nerve complaints at the level of the elbow. Each of these will be computed separately as per the Supreme Court's directive.

The balance of the impairment ratings are to the shoulder and consistent with the Board's earlier approach of averaging the opinions of the two physicians, the Board finds that claimant's permanent partial functional impairment to his left shoulder is 3.5 percent and to the right shoulder 14.5 percent.

The next issue the Board must address involves TTD and respondent's request to offset or credit the entire 18¹¹ weeks of TTD that were paid to claimant against each

⁵ Dr. Do did not assign any impairment for carpal tunnel as claimant allegedly did not complain about this problem.

⁶ This 5 percent was for carpal tunnel complaints only. Dr. Do found no ulnar nerve impairment.

⁷ As with the left, Dr. Do did not assign any impairment for ulnar nerve as claimant allegedly did not complain about this problem.

⁸ This 10 percent was for carpal tunnel complaints.

⁹ This 10 percent is for carpal tunnel complaints.

¹⁰ This additional 10 percent is for ulnar nerve complaints.

¹¹ See Footnote No. 2.

separately scheduled injury and resulting award. This argument is based upon the *Bergstrom*¹² opinion and distilled to its essence, respondent contends that the provisions of the Workers Compensation Act (Act) require TTD weeks to be deducted from the total number of weeks available for that scheduled body member, then multiply the applicable impairment percentage by the number of weeks remaining. Respondent maintains that nothing within the Act permits the Board to apportion or deduct anything less than the total amount of TTD benefits paid from *each* scheduled injury. In essence, respondent seeks to deduct 18 weeks of TTD from each scheduled injury.

The Board has, in the past, been confronted with this issue. When parties appear before the ALJ for the prehearing settlement conference and at the Regular Hearing, the amount of TTD paid, rate, and dates the monies were paid is always sought. Sometimes, the dates these monies were paid are not set out or read into the record. But those figures and dates and for which injury it was paid are far more critical now for purposes of calculating an injured claimant's resulting award.

K.A.R. 51-7-8 provides that the number of weeks paid for TTD are deducted from the number of weeks allowed for loss of use of the scheduled member before that number is multiplied by the percentage of disability. If, as here, a claimant receives TTD for a period of time but has several injuries, it is critical to know precisely what period of time those benefits were paid for and for which injury.

K.S.A. 51-7-8(a)(1) also provides that "If a worker suffers a loss to a member and, in addition, suffers other injuries contributing to the temporary total disability, compensation for the temporary total disability shall not be deductible from the scheduled amount for those weeks of temporary total disability attributable to the other injuries."

This Board has frequently come across this problem and the lack of evidence contained within the record but has frequently managed to obtain stipulations from the parties as to how the TTD monies are to be split amongst the injuries.¹³ No such agreement was available here, although at oral argument claimant's counsel suggested the majority of the TTD was paid following the shoulder injury.

The Board concludes that the intent of the Act, as well as the regulations, was to deduct actual monies paid in TTD once, and only once, crediting those payments as against the injury for which they were paid. Obviously, K.A.R. 51-7-8(a)(1) contemplates that the TTD credit should not be duplicated or applied more than once where there are multiple injuries.

¹² *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

¹³ See e.g., *Zehner v. Chanute Healthcare Center*, No. 1,014,678, 2008 WL 651660 (Kan. WCAB Feb. 25, 2008); and *Pruter v. Larned State Hospital*, No. 241,765, 2002 WL 230933 (Kan. WCAB Jan. 10, 2002).

Here, there is a lack of a factual basis to determine when the TTD benefits were paid, other than to know that 18 weeks were paid. Claimant's counsel suggested that those benefits were most likely paid following claimant's shoulder injuries. Failing any further evidence, the Board finds and concludes that in this case the most fair and reasonable method (indeed the method that has been used in the past without objection) is to merely equally split those weeks amongst the two shoulder impairments. Thus, 9 weeks of TTD will be credited against the resulting shoulder impairments found above.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the claimant's Award is hereby as follows:

LEFT FOREARM

Claimant is entitled to 2.29 weeks of permanent partial disability at the rate of \$384.23 per week, or \$879.88, based upon an average weekly wage of \$576.32, followed by for the period commencing August 1, 2005, 7.71 weeks of permanent partial disability compensation, at the rate of \$426.89 per week, in the amount of \$3,291.32, based upon an average weekly wage of \$640.31, for a 5 percent loss of use of the forearm, making a total award of \$4,171.20.

RIGHT FOREARM

Claimant is entitled to 2.29 weeks of permanent partial disability at the rate of \$384.23 per week, or \$879.88, based upon an average weekly wage of \$576.32, followed by for the period commencing August 1, 2005, 12.71 weeks of permanent partial disability compensation, at the rate of \$426.89 per week, in the amount of \$5,425.77, based upon an average weekly wage of \$640.31, for a 7.50 percent loss of use of the forearm, making a total award of \$6,305.65.

RIGHT ARM

Claimant is entitled to 2.29 weeks of permanent partial disability at the rate of \$384.23 per week, or \$879.88, based upon an average weekly wage of \$576.32, followed by for the period commencing August 1, 2005, 8.21 weeks of permanent partial disability compensation, at the rate of \$426.89 per week, in the amount of \$3,504.76, based upon an average weekly wage of \$640.31, for a 5 percent loss of use of the arm, making a total award of \$4,384.64.

LEFT SHOULDER

Claimant is entitled to 2.29 weeks of temporary total disability at the rate of \$384.23 per week, or \$879.88, based upon an average weekly wage of \$576.32, followed by for the period commencing August 1, 2005, 6.71 weeks temporary total disability at the rate of \$426.89 per week, or \$2,864.43, followed by 7.56 weeks of permanent partial disability compensation at the rate of \$426.89 per week, or \$3,227.28, based upon an average weekly wage of \$640.31, for a 3.50 percent loss of use of the shoulder making a total award of \$6,971.59

RIGHT SHOULDER

Claimant is entitled to 2.29 weeks of temporary total disability at the rate of \$384.23 per week, or \$879.88, based upon an average weekly wage of \$576.32, followed by for the period commencing August 1, 2005, 6.71 weeks temporary total disability at \$426.89 per week, or \$2,864.43, followed by 31.32 weeks of permanent partial disability compensation, at the rate of \$426.89 per week, or \$13,370.19, based upon an average weekly wage of \$640.31, for a 14.50 percent loss of use of the shoulder, making a total award of \$17,114.50.

IT IS SO ORDERED.

Dated this _____ day of April 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael L. Snider, Attorney for Claimant
Terry Torline, Attorney for Respondent and Royal
Bill Townsley, Attorney for Respondent and Travelers
Marvin Appling, Special Administrative Law Judge
Nelsonna Potts Barnes, Administrative Law Judge